IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH "E", MUMBAI

Before SHRI G.E.Veerabhadrappa, President,
Shri D.K.Agarwal, J.M. and Shri P.M.Jagtap, A.M.

ITA Nos.6490 and 6491/Mum/2008
(Asst.Years 2004-05 and 2005-06)

M/s Tulip Hotels Pvt. Ltd. Chandramukhi(Basement) Behind The Oberoi, Mumbai-400 021. (PAN: AAACT9446Q)	Vs.	Deputy Commissioner of Income Tax, Central Circle 36, Mumbai.
Appellant		Respondent

Date of Hearing	: 1.2.2012
Date of Pronouncement	: 30.3.2012

Appellant by : Shri Arvind Sonde
Respondent by : Shri B.Jaikumar

O R D E R

Per Bench :

The Hon'ble President of the Income Tax Appellate Tribunal, on a reference made by a Division Bench, has constituted this Special Bench vide order dated 14.5.2010 and the following question has been referred for our consideration and decision:-

> "Whether on a proper interpretation of sub-section (4) of section 255 of the Income Tax Act, the order proposed by the learned AM while giving effect to the opinion of the majority

consequent to the opinion expressed by the learned Third Member, can be said to be a valid or lawful order passed in accordance with the said provision"

2. The factual matrix of the case leading to the recommendation for the constitution of this Special Bench by the Division Bench is as follows:

3. The assessee company is engaged in the business of operation and management of hotels owned by third parties. The assessee has taken over the management of the hotel property, viz. Tulip Star Mumbai, situated at Juhu Tara Road, Juhu, Mumbai. The assessee was redeveloping the said property into a multi product hospitability destination and was also developing international standard Service Apartments. The assessee offered the space in the same property to Shri Somendra Khosla of UAE on a 99 years lease basis. After negotiation, Shri Khosla agreed to acquire the space admeasuring 12700 sq. ft. at the rate of Rs.7,500/- per sq. ft. In pursuance to such booking of the property, Shri Khosla advanced the sum of Rs.4,78,12,403/- during the accounting year relevant to assessment year 2004- 05 and the sum of Rs.1,02,91,176/- in the accounting year relevant to assessment year 2005-06. During the assessment

proceedings, the assessee produced the copies of correspondence between the assessee and Shri Khosla; confirmation of Shri Khosla with regard to advance given by him; complete details with regard to remittance in USD; the correspondence showing why the property could not be developed as stipulated and the termination of the agreement with the liability on the assessee to refund the money. The assessee also produced the certificate from Citibank, Mumbai, certifying the receipt of inward foreign remittance by the assessee, which was sent by Shri Khosla. The Assessing Officer, not being satisfied with the evidences furnished before him held that the assessee has not established the identity, creditworthiness and genuineness of the transaction and accordingly added an amount of Rs.4,78,12,403/- u/s 68 of the Income Tax Act, 1961 (the Act) to the total income of the assessee. In the assessment year 2005-06 also, the assessee had received a sum of Rs.1,02,91,176/- from Shri Khosla and for the same reasons given in the assessment order for the assessment 2004-05, the AO added the sum of Rs.1,02,91,176/- as income of the assessee u/s 68 of the Act. On appeal before the CIT(A), the assessee furnished various additional

evidence in the form of certificate from a Chartered Accountant, giving the details of the properties owned by Shri Khosla; copy of his Passport; the Trade License issued to the company of Shri Khosla, viz. Dome Services (FZC); copy of his telephone bill, electricity bill; newspaper cuttings showing the voluminous business being done by the company named as New World Real Estate (NWRE), whose President is Shri Somendra Khosla; the Heath Card and other Cards issued by the Government of UAE. The ld. CIT(A) while observing that these documents were not produced before the Special Auditor during the special audit conducted u/s 142(2A) of the Act or the AO at the time of assessment , held that the same cannot be admitted being fresh evidence at the appellate stage as the appellant has failed to explain the reasons for not producing these documents before the AO or Special Auditor. He further held that since no evidence of creditworthiness of Shri Somendra Khosla was produced during the assessment proceedings, the AO was justified in making addition u/s 68 of the Act Rs.4,78,12,403/- for the assessment year 2004-05 and Rs.1,02,91,176/- for the assessment year 2005-06.

4. With regard to the second issue of disallowance of payments, the brief facts are that the assessee has entered into an agreement with M/s Tulip Hospitality Services Ltd.(THSL) for operating their Hotel Tulip Star, Mumbai for which the assessee is entitled to operating fee @ 3% and reimbursement of actual expenditure incurred by it on operating the hotel. The assessee entered into another contract with M/s Tulip Star Hotels Pvt. Ltd. (TSHL) for operating the Hotel Tulip Star, Mumbai, by which TSHL is to get 3% of the gross hotel receipt. Thus, whatever the amount assessee is entitled to receive from THSL is to be passed on to TSHL. The assessee also entered into an agreement with M/s Cox & King (India) Pvt. Ltd. (CKIL) for using their network of office and infrastructure for brand awareness and marketing of Tulip Star hotel for which CKIL is entitled to reimbursement of expenses actually incurred by them. CKIL raised monthly debit note upon the assessee for expenditure incurred by them. In turn, the assessee raised debit note of identical amount upon THSL. During the whole year, CKIL raised debit note of Rs.7,56,16,910/- and in turn, similar debit note is raised by the assessee. The amount received from

THSL is paid to CKIL. In its profit and loss account, the assessee has not claimed any deduction in respect of debit note raised by CKIL, because the same was already reimbursed by THSL.

With regard to the operating fee of Rs.61,93,015/- is concerned it entered into an agreement with THSL for operating their hotel namely Tulip Star. Simultaneously, the assessee entered into another agreement with THSL for operating the said hotel. The entire operating fee receivable by the assessee for operating the hotel was passed on to TSHL. Therefore, in effect, the assessee has not claimed expenditure of Rs.61,93,015/-. The AO however, did not accept the claim. It was observed by him that the auditors had clearly stated that the assessee had claimed the expenditure in P & L account. It was observed by him that the assessee had understanding with TSHL & CKIL to provide various services and therefore question of reimbursement did not arise and even if the services were actually provided by CKIL and TSHL the assessee was required to deduct tax at sources in respect of payments made to them as the same were in the nature of contractual payments. The AO accordingly disallowed the claim of

deductions of Rs.7,56,16,910/- and Rs.61,93,015/- for assessment year 2004-05. Similar deduction had also been claimed in assessment year 2005-06 i.e. sum of Rs.7,95,73,902/- on account of brand awareness activities paid to CKIL and Rs.37,03,683/- on account of operating fees paid to THSL. For the reasons given in the assessment order for the assessment year 2004-05 the AO disallowed the said claims in assessment year 2005-06 also. In appeal CIT(A) confirmed the above disallowances made by the AO.

5. On appeal before the Tribunal, on the issue of sustenance of addition u/s 68 of the Act, both learned Members have considered the evidence produced before the AO as well as the additional evidence. The learned Judicial Member, after considering all the evidence, i.e. the evidence produced before the Assessing Officer as well as the additional evidence, came to the conclusion that the assessee has discharged the onus of proving the cash credit lay upon it and accordingly he ordered for deletion of addition; while the learned Accountant Member was of the opinion that even after considering the additional evidence the assessee has not been able to discharge the onus of proving the cash credit and hence upheld

the order of ld.CIT(A) sustaining the addition made by the AO.

6. On the second issue of disallowance of payments, the ld. Judicial Member while observing that there is only incoming and outgoing entries in the books and for this reason neither the assessee has shown in its profit and loss account any incoming entry/ income nor outgoing entry/ expenditure, deleted the disallowance of Rs.7,56,16,910/- and Rs.61,93,015/- for the assessment year 2004-05 and for the same reasons he also deleted the disallowance of Rs.7,95,73,902/- and Rs.37,03,683/- for the assessment year 2005-06. However, the ld. Accountant Member while observing that there is no evidence for services rendered by CKIL and mere agreement or payment by cheque is not enough, the claim has to be disallowed in view of the provisions of section 40(1)(ia) of the Act on the ground of non deduction of tax, confirmed the above disallowances made by the AO.

7. Since there was a difference of opinion between the members constituting the Bench, a Reference was made to the Hon'ble President under section 255(4) of

the Income Tax Act, 1961, for referring the points of difference to the ld. Third Member for adjudication of the following points of difference: -

> "Whether on the facts and circumstances of the case:
>
> i) the additions of Rs.4,78,12,403/- and Rs.1,02,91,176/- made and confirmed by the lower authorities u/s 68 for AYs 2004-05 and 2005-06 respectively are liable to be deleted or to be confirmed?
>
> ii) the addition made and confirmed by the CIT(A) on account of reimbursement of expenses to M/s Cox & King (India) Pvt. Ltd. and to M/s Tulip Star Hotels Pvt. Ltd. for AYs 2004-05 and 2005-06 are liable to be deleted or confirmed?"

8. The ld. Third Member on the first point of difference vide paragraphs 22 and 23 of his order dated 27.11.2009 held as under :

> "22. Considering the totality of the above facts namely that Shri Somendra Khosla is a NRI, he is in the business of development of real estate and he is a man of substantial means, in my opinion, if he has decided to invest in the real estate in India, the genuineness cannot be doubted unless there is any evidence to the contrary. The Revenue has doubted the genuineness merely on the basis of presumption and suspicion ignoring the documentary evidences produced by the assessee, which establish the genuineness of transaction.
>
> 23. In view of the above, in my opinion, the assessee has duly established the identity of the creditor, creditworthiness of the creditor and also genuineness of the transaction. Thus, the onus of proving the cash credit which lays upon the assessee is duly discharged. Accordingly, I answer

question no.1 in favour of the assessee and hold that the addition of Rs.4,78,12,403/- and Rs.1,02,91,176/- made and confirmed by the lower authorities under section 68 of the Income Tax Act are liable to be deleted."

On the second point of difference, the ld. Third Member vide paragraphs 27, 28 and 29 of his order has held as under :

"27.....The assessee has furnished the profit and loss account in its paper book and from the perusal of which it is evident that the total expenditure debited in the profit and loss account was only Rs.86,97,337/-. When the total expenditure incurred by the assessee during the year under consideration was Rs.86,97,337/-, by no stretch of imagination, it can include the expenditure incurred by CKIL for which debit note amounting to Rs.7,56,16,910/- was raised by the assessee. When the assessee has not claimed the deduction in respect of the expenditure of Rs.7,56,16,910/-, the question of disallowing the same in the case of the assessee cannot arise.

28. With regard to the operating fee of Rs.61,93,015/- is concerned, I find that the assessee received the identical amount from THSL and paid the same to TSHL. Here again, in real terms, the assessee has neither received any income nor incurred any expenditure. It entered into an agreement with THSL for operating their hotel namely Tulip Star. Simultaneously, the assessee entered into another agreement with THSL for operating the said hotel . The entire operating fee receivable by the assessee for operating the hotel was passed on to TSHL. Therefore, in effect, the assessee has not claimed expenditure of Rs.61,93,015/-. As I have mentioned earlier that in the profit and loss account, the assessee debited total expenditure of only Rs.86,97,337/- the details of which is given in the Schedule 'G' to the profit and loss account which is as under :

"SCHEDULE ANNEXED TO AND FORMING PART OF THE ACCOUNTS FOR THE YEAR ENDED 31 ST MARCH 2004

SCHEDULE "G"	Rs.	Rs.	Previous Year Rs.
OPERATING AND ADMINISTRATIVE EXPENSES			
Salaries		1,339,850	1,398,033
Gratuity		153,159	175,500
Staff Welfare		796,444	755,280
Travelling & Conveyance		1,101,082	1,775,118
Printing & Stationery		337,992	586,543
Bad Debts Written off		1,545,625	3,758,655
Communication Expenses		838,142	1,328,648
Repairs & Maintenance		170,462	160,122
Vehicle Expenses		558,545	931,927
Legal & Professional Fees		583,426	1,738,975
Entertainment Expenses		60,876	142,431
Audit Fees		33,000	37,650
Business Promotion Expenses		12,755	46,069
Rent, Rates & Taxes		310,048	394,516
Membership & Subscription		3,750	4,000
Electricity Expenses		110,582	140,776
Interest Charges		110,010	--
Office Expenses		97,237	95,782
Sundry Expenses		532,452	537,326
Preliminary Expenses Written Off		900	900
Total		**8,697,337**	**14,008,251**

29. From the above details of the expenditure, it is evident that the assessee has not claimed any deduction in respect of operating fees paid by it to TSHL. When no deduction is claimed, the question of disallowing the same does not arise. Before I part with the matter, I may clarify that the expenditure was actually incurred by TSHL and whether such expenditure is allowable or not is to be examined in the case of THSL. So far as the assessee's case is concerned, in my opinion, when no deduction was claimed, the question of any disallowance does not arise. Similar is the fact in assessment year 2005-06 except variation in the amount. Therefore, my finding for the assessment year 2004-05 would be squarely applicable to assessment year 2005-06. Accordingly, I answer the question no.2 also in favour of the assessee and hold that the addition made and confirmed by the CIT(A) on account of reimbursement of expenses to M/s. Cox & King (India) Pvt. Ltd. and to M/s.Tulip Star Hotels Pvt.Ltd. for the assessment years 2004-05 and 2005-06 are liable to be deleted."

Accordingly the ld. Third Member while agreeing with the opinion of ld.Judicial Member, has decided both the issues in favour of the assessee.

9. While giving effect to the opinion of the ld. Third Member, the ld. Judicial Member passed the conformity order in February 2010. However, the ld. Accountant Member observed that it is not possible to give effect to the order of the ld. Third Member as the order of the ld. Third Member is contrary to his own expressed opinion and has also not considered various points of differences arising from the proposed orders of the members of the bench. There is also difficulty in forming the majority of opinion. The difficulty, it appears has arisen partly because of the question framed being too general without specifying the point of differences in deciding the issue and partly because some of the vital facts have been omitted to be considered in the order of the ld. Third Member. The ld. Accountant Member, after considering the arguments of both the sides observed that it would be appropriate for the Division Bench to refer the matter back to the Hon'ble President, ITAT than to pass perverse order so that the controversy could be

resolved properly and accordingly, he framed following new questions:

> "1. Whether on the facts and in the circumstances of the case, the additional evidence which had not been filed before AO, can be admitted by the tribunal in deciding the issue of cash credit and if so whether the tribunal can decide the issue based on fresh evidence or the issue is required to be restored to the file of the AO for fresh adjudication after examining the detailed evidence and after necessary inquiries and opportunities to the assessee.
>
> 2. Whether on the facts and circumstances of the case, as highlighted in the proposed order of the AM and particularly the fact that the assessee produced no evidence to show that the foreign remittances credited in the accounts of the assessee had been made out of funds belonging to the creditor, the cash credit can be taken as explained satisfactorily only on the ground that the assessee was doing business and owned several properties.
>
> 3. Whether considering the finding of the AO and the auditor's note and all other relevant material it can be said that the assessee had not claimed any expenditure in relation to the payment made to Cox & Kings and Tulip Star Hotels Ltd. and whether the claim of expenditure can be allowed considering the facts and circumstances of the case."

10. The ld. Judicial Member has expressed his disagreement with the course adopted by the ld. Accountant Member and in a note dated 23.2.2010 has proposed the following question to be referred to the Special Bench or Larger Bench to resolve the controversy:

"Whether on the facts and circumstances of the case, the Members of the Bench, could comment on the order of the Third Member, instead of passing a confirmatory order in terms of section 255(4) of the Act?"

11. However, the Hon'ble President on careful perusal and consideration of the issue observed that a Special Bench consisting of three or more Members may have to be constituted to resolve the issue. It involves interpretation of sub-section (4) of section 255 which provides that the point on which difference arose shall be decided in accordance with the opinion of the majority. The question to be considered is whether at that stage (i.e., the stage of giving effect to the opinion of the ld.Third Member) it is legally permissible, having regard to the statutory provision, for a Member who is in the minority to decline to give effect to the opinion of the majority whatever be his reasons. In addition to the question of interpretation, it also involves the issue of judicial decorum. The questions proposed by the ld. Accountant Member touche upon the merits of the decision of the ld.Third Member. The question proposed by the ld. Judicial Member touches upon the duty/power of the Bench sitting to give effect to the majority opinion u/s 255(4) and accordingly he constituted this Special

Bench to resolve the controversy on the question referred in page 1 of this order.

12. At the time of hearing, the ld. Counsel for the assessee after referring to the relevant provisions of section 255(4) of the Act submits that in view of the findings recorded by the ld. Judicial Member in paragraphs 14.1, 30, 31, 35, 41 and 42 of the draft order dated February 2009 and paragraphs 23 and 29 of the opinion of the ld. Third Member, there is a majority of opinion in favour of the assessee, therefore, the order passed by the ld. Judicial Member be upheld. He further submits that the ld. Third Member after considering the questions which have been agreed and signed by both the Members has answered the questions in favour of the assessee, therefore, there is clear majority of opinion in favour of assessee. He further submits that the ld. Accountant Member in the order giving effect to the order of the ld. Third Member has observed that the questions framed being too general without specifying point of difference in deciding the issue and particularly because some of the vital facts have been omitted to be considered in the order of the ld.Third Member, therefore, he has framed three new questions

which were not there at the time of reference to the ld. Third Member. In other words, he has taken a U-turn which is not permissible under the provisions of section 255(4) of the Act. He further submits that it has been observed by the ld. Third Member, at page 3 of his order, that the additional evidence has been considered by both the ld. Members. The ld. Judicial Member on the evidence produced before the AO as well as the additional evidence came to the conclusion that the assessee has discharged the onus of proving the cash credit laid upon it. Whereas according to the ld. Accountant Member even after considering the additional evidence the assessee has not been able to discharge the onus of proving the cash credit. He further submits that once it has been held by the majority of opinion that the assessee has duly established the identity of the creditor, creditworthiness of the creditor and also genuineness of the transaction, the onus of proving the cash credit which lay upon the assessee is fully discharged, therefore, the order passed by the ld. Judicial Member attained the majority and hence the questions which have been framed by the ld. Account Member in his order dated 18.2.2010 are against the provisions of

section 255(4) of the Act. He further submits that while giving the effect to the opinion of the ld.Third Member under the provisions of section 255(4), we have to ascertain the majority view and not to consider the correctness of the view, therefore, the ld. Accountant Member is not justified in doubting the correctness of the opinion of the majority.

13. The ld. Counsel for the assessee while referring to the decision in A.N.Seth V/s CIT (1969) 74 ITR 852 (Del) submits that the duty of the ld. Third Member is to decide the point of difference which the Members of the Bench originally heard the case differed. He cannot himself formulate a new point on which he could base his decision. In the case before us, the ld. Third Member has decided the issues on the basis of reference jointly signed by both the Members, therefore, the opinion expressed by the ld. Third Member is a valid opinion in the eyes of the law.

14. The ld. Counsel for the assessee while referring to the decision in Niraj Petrochemicals Ltd. V/s ITO (2001) 248 ITR (AT) 1(Hyd) submits that the ld.Third Member cannot alter the referred questions to him or

cannot modify the questions and/or reframe the questions and then decide the reframed questions instead of the original questions. He further submits that the ld. Third Member while deciding the issue can take a different route but cannot alter the questions framed and he has to agree either with the opinion of the ld. Judicial Member or with the ld. Accountant Member.

15. The ld. Counsel for the assessee while referring to the decision in Jain Irrigation System Ltd. V/s DCIT(2004) 266 ITR (AT) 31 (Pune) submits that the duty of the ld.Third Member is to resolve the dispute and point involved shall be decided according to the opinion of majority. The ld.Third Member is competent to decide only the point on which the members of the bench originally hearing the case differed. He cannot himself formulate a new point on which he could base his decision.

16. The ld. Counsel for the assessee further submits that in view of the decision in ITO V/s Vice-President, Income Tax Appellate Tribunal (1985) 155 ITR 310 (Mad) the powers of the ld.Third Member of the Tribunal to whom any case is referred u/s 255(4) of

the Act is confined to the giving of a decision on the points on which the members of the Tribunal had differed and which has been formulated by them as the question for the decision of the ld. Third Member. He further submits that according to this decision the ld. Third Member cannot remit the matter back to the two Members who originally heard the appeal to re-hear the matter which is beyond his jurisdiction.

17. The ld. Counsel for the assessee further refers to the decision of the Tribunal in Rameshwar Soni V/s ACIT (Invst.) (2005) 279 ITR (AT) 60 (Jodhpur) to contend that the jurisdiction of the Tribunal u/s 255(4) is confined to deciding the points of difference according to the majority of the Members of the Tribunal and not beyond that.

18. The ld. Counsel for the assessee further refers to the decision of the Tribunal in H.P. Agro Industries Corporation Ltd. V/s DCIT (1999) 240 ITR (AT) 62 (Chd) to submit that the ld.Third Member is fully empowered in law to arrive at the same end result as done by any of the Members constituting the Division Bench although he may do it by a different route and all that is necessary is that he must agree with one

of the members constitution the Division Bench and who have disagreed on the point at issue.

19. The ld. Counsel for the assessee while referring to the decision of the Hon'ble Delhi High Court in CIT V/s Sudhir Choudhrie (2005) 278 ITR 490(Delhi) submits that the duty of the Tribunal is to pronounce its judgments and orders in open hearing upon enlisting them for a given date. Since in this case, there is no final order and only opinions were expressed by the Members constituting the Bench and the ld.Third Member, therefore, the order passed by the respective Members/ Third Member is merely an opinion which cannot be said that the Tribunal has passed any order so far. Therefore, the contention of the Revenue that there is a mistake in the order passed by the ld.Third Member is devoid of any merit.

20. He, therefore, submits that since in this case opinion of the majority has been arrived at on the questions referred to by both the Members who originally heard the appeal, therefore, the effect may be given in view of the provisions of section 255(4) of the Act as per opinion of majority which is in favour

of the assessee and the opinion expressed by the ld. Accountant Member, while giving the effect to the order of the ld. Third Member is not in accordance with the provisions of section 255(4) of the Act as he is in the minority.

21. On the other hand, the ld. DR, at the outset, submits that there is a technical mistake in the question referred to Special Bench wherein it has been mentioned " the order proposed by the ld. Accountant Members", whereas there is no such order and only an opinion, therefore, the question referred should suitably be amended. The ld. DR while referring to the opinion expressed by the ld.Third Member dated 27.11.2009 submits that even according to the ld. Third Member on the issue of admission of additional evidence it has been observed by him that *"In principle I agree with the learned DR that when the Income Tax Appellate Tribunal admits additional evidence, it should allow a reasonable opportunity to the Assessing Officer to examine such additional evidence and to produce any evidence or document in rebuttal of such additional evidence. For this purpose, either the ITAT can call for the Remand Report from the Assessing Officer or may set aside the matter to*

the Assessing Officer for examination of additional evidence and thereafter re-adjudication. Admittedly, it has not been done by the ITAT in this case". Therefore, the order passed by the ld. Third Member admitting the additional evidence is not a valid order in the eyes of law. He further submits that it is borne out from the assessment order that the assessee has never filed any such evidence before the AO in support of the said credits. Therefore, the AO was fully justified in making the addition u/s 68 of the Act.

22. He further submits that it has been held in Abhay Kumar Shroff V/s ITO (1997) 63 ITD (Pat) 144 that where additional evidence enables the Tribunal to pass orders or for any other substantial cause it could require the parties to do so. There is no gain saying that while this power could be exercised by the Appellate Tribunal suo motu the jurisdiction vested in the Tribunal could be got invoked at the instance of one of the parties before it. Relying on the said decision he submits that it was the duty of the Tribunal to exercise his power to provide a reasonable opportunity of being heard to the department for examining the evidence submitted by the assessee which has not been done in this case, therefore, in

the interests of justice the matter may be set aside to the file of the AO.

23. The ld. DR further submits that in ITO V/s Baker Technical Services (P) Ltd. (2009) 126 TTJ(Mumbai)(TM) 455 it has been held that when a majority opinion has not been formed it was suggested by the ld. Third Member that a reference may be made to the Hon'ble President for making a further reference to a Member or Members for resolving the difference of opinion in accordance with law. Relying on the same view the ld.DR submits that both the Members while giving effect to the opinion of the ld. Third Member have passed two separate orders, therefore, the opinion of the majority has not been formed in this case and therefore, the issue may be decided fresh.

24. The ld. DR further submits that in M/s Deepak Agro Foods V/s State of Rajasthan & Ors. (SC) (Civil Appeal Nos.4327-28 of 2008 (arising out of Special Leave Petition (C) No.17346-47 of 2005 and Ors. dated 11.7.2008, it has been observed that *"where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non est*

and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties,". Relying on the same he submits that since in this case the additional evidence produced by the assessee before the Tribunal has not been admitted by the Tribunal by any specific order, therefore, the order passed by the ld. Third Member after considering the additional evidence is without jurisdiction, non est and void ab initio.

25. The ld. DR further submits that in Khopade Kisanrao Manikrao V/s ACIT (2001) 250 ITR 18(Pune); (2000) 74 ITD 25(Pune), it has been observed that power of the ld. Third Member is not limited to the language of the questions framed in the reference but it extents to entire sum and substance of the opinion on the specified point(s); the Third Member has power to consider the entire material, the reasoning and the conclusion recorded by the Members as well as the contentions advanced on behalf of the parties. Relying on the same he submits that in the absence of any specific order of admission of the additional evidence either by the ld. Accountant

Member or by the ld. Judicial Member or by the ld. Third Member, the opinion given by the ld. Third Member is bad in law.

26. The ld. DR further submits that in Collector, Central Excise, Bombay V/s M/S. S.D. Fine Chemicals Pvt. Ltd.(1995)(3)SCR 84, it has been observed and held that, if the third Member of the Tribunal has not dealt with the case in a full and proper manner and has disposed of the issue in a cryptic manner, therefore, it become necessary to remit the matter for the fresh opinion of the third Member of the Tribunal. Relying on the above decision, the ld. DR submits that since in the case of the assessee, there is no mention about the admission of the additional evidence, therefore, the order passed by the ld.Third Member has to be set aside.

27. The ld. DR further submits that in B.T.Patil & Sons Belgaum Construction (P.) Ltd V/s ACIT (2010) 35 SOT 171(Mum)(LB) it has been held that the parties are entitled to file additional evidence before the ld. Third Member. Relying on the same he submits that in the case of the assessee, the additional evidence was already on record, therefore, it was the

duty of the Third Member to pass a specific order for admission of the same which has not been done, therefore, the order passed by the Third Member is void ab initio.

28. The ld.DR while relying on the decision in CIT V/s Shri Ramdas Motor Transport (1999) 238 ITR 177 (AP) submits that the order passed by the Third Member should be well considered order, answered the reference by giving sound and valid reasons. In the case of the assessee the order passed by the Third Member is not a well considered order, therefore, the same may be set aside.

29. In the light of the above, the ld. DR submits that the order passed by the ld.Third Member is not a valid order, and in the absence of any opinion of the majority, the order passed by the ld.Third Member may be set aside and the issue may be decided afresh.

30. We have carefully considered the submissions of the rival parties and perused the material available on record. To appreciate the controversy in proper perspective it is seemly to reproduce section 255(4) of the Act which reads as under :

> **"255.** (1) ……
> (2) …
> (3)….
> (4) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it."

31. A harmonious reading of the aforesaid provision shows that the majority decision of the Bench of the Tribunal has to prevail and in case of difference of opinion among equal number of members of the Tribunal, the matter is further required to be decided by one or more of the other members of the Tribunal and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it. Thus, it is the final conclusion of majority of the members of the Tribunal which is to prevail.

32. In this regard, we may refer with profit to the following decisions relating to the relevant provisions of section 255(4) of the Act.

33. In A.N.Seth (supra), Their Lordship have observed as under (page 860 of 74 ITR) :

> "Under this provision, if the Members of a Bench of the Appellate Tribunal are equally divided on any point or points, the said point or points have to be referred to one or more of the other Members of the Tribunal for his or their opinion. A reading of the sub-section shows that it contemplates a difference amongst the Members on the conclusion on a point, and not a difference in the reasoning or reasons for arriving at the conclusion. Therefore, if the Members agree on the conclusion on a point, but differ in the reasoning or reasons for arriving at the conclusion, the provision in the sub-section does not apply, and the question of any reference to one or more of the other Members does not arise……"

34. In ITO V/s Vice-President, ITAT (supra), it has been observed and held that the power of the third member to whom the case is referred under section 255(4) is confined to the giving of a decision on the point(s) on which the two members had differed and which has been formulated by them as a question or questions for the decision of the third member. The third member acting under section 255(4) does not have any power to direct the two members of the Tribunal who had differed on the point(s) referred to him to decide on a particular point or points or act in a particular manner. The third member cannot act as if he was an appellate authority over the two members

of the Tribunal and direct them to rehear and dispose of the matter afresh.

35. In H.P. Agro Industries Corporation Ltd.(supra) it has been observed and held (page 77):

> "A question may be raised at this stage as to how the Third Member has expressed an opinion different from the one given by the two Members constituting the Division Bench. In my opinion, the Third Member is fully empowered in law to arrive at the same end result as done by any of the Members constituting the Division Bench although he may do it by a different route and all that is necessary is that he must agree with one of the Members constituting the Division Bench and who have disagreed on the point at issue. By means of the present order I have held that the deduction of Rs.10,090 is allowable and the learned Accountant Member has also expressed a similar opinion by allowing the miscellaneous petition filed by the assessee. In other words, the majority opinion of the Tribunal is available as a result of the present Third Member order and the matter shall now be posted before the Division Bench for passing an order in conformity with the majority opinion."

36. In Khopade Kisanrao Manikrao (supra), it has been held (headnote, page 22):

> "A plain reading of section 255 of the Income-tax Act, 1961, makes it clear that the jurisdiction of the Third Member is in regard to the point of difference and the framing of the question for a reference under section 255(4) need not be equated with a reference to the High Court under section 256. Under section 256, the High Court, till, recently, had advisory jurisdiction in regard to any question of law arising out of the order of the Tribunal and referred to the High Court for its opinion. In the case of the reference under section 255(4) to the Third Member, the object is to

> resolve the difference in opinion on any point which arises in the course of deciding of an appeal. Therefore, the jurisdiction of the Third Member is not limited to the language of the question(s) framed in the reference but it extends to the entire sum and substance of opinion on the specified points. The questions are framed in accordance with rules for identifying the dispute but it is a well settled principle of law that the rules cannot restrict the scope of the powers conferred under the statute. Therefore, the rules do not have the effect of curbing the scope of powers of the Third Member conferred upon him under section 255(4)."

37. Applying the ratio of the aforesaid decisions to the facts of the present case, we find that there is no dispute that there was a difference of opinion between the two Members who originally heard the appeal and the reference was made to the Hon'ble President of the Tribunal, u/s 255(4) of the Act for referring the points of difference to the ld.Third Member. The Hon'ble President accordingly referred the said matter for a decision to a Third Member. The ld. Third member after giving the opportunity to the parties observed that *"the Judicial Member after considering all the evidences i.e. evidence produced before the AO as well as the additional evidence, came to the conclusion that the assessee has discharged the onus of proving the cash credit lay upon it; while the ld. Accountant Member was of the opinion that even*

after considering the additional evidence the assessee has not been able to discharge the onus of proving the cash credit" and held that the assessee has duly established the identity of the creditor, creditworthiness of the creditor and also the genuineness of the transaction. Thus, the onus of proving the cash credit which lays upon the assessee is duly discharged and accordingly the ld. Third Member while agreeing with the views of the ld. Judicial Member answered the first question in favour of the assessee. Similarly, on the other issue of addition on account of reimbursement of expenses he observed that when no deduction was claimed, the question of any disallowance does not arise and accordingly while agreeing with the views of the ld. Judicial Member answered the other question also in favour of the assessee, and deleted the additions made by the AO. Thus, in this case, opinion of the majority has arrived at in favour of the assessee.

38. However, we find that while giving effect to the opinion of the Third Member, ld. Accountant Member has again formulated three questions which we have already referred in paragraph 9 of this order. According to the ld. Accountant Member since the

additional evidence has not been filed before the AO, the ld.Third Member cannot decide the issue based on fresh evidence filed before the Tribunal, rather the ld. Third Member is required to restore the same to the file of the AO for fresh adjudication after examining the said evidence and after providing reasonable opportunity of being heard to the assessee.

39. From the reading of the above, there is no doubt that the ld. Accountant Member while agreeing with the questions formulated at the time of the original reference to the Hon'ble President of the ITAT has again framed three new questions at the time of giving effect to the opinion of the majority de hors the provisions of section 255(4) of the Act as he had become functus officio after he passed his initial draft order. This view also finds support from the decision in Delhi Press Samachar Patra Ltd. V/s CIT (2004) 267 ITR 458 (Del), wherein it has been held (headnote):

> "Held, that the Accountant Member had become functus officio after he passed his initial order. Secondly, the procedure prescribed by the statute had not been followed. In such a situation, the procedure indicated in sub-section (4) of section 255 of the Income-tax Act, 1961, is required to be followed. It was incumbent upon the members to state the points on which they differed and the

case was required to be referred to the President of the Tribunal for appropriate orders."

40. At this juncture, we cannot resist observing that the opinion expressed by the ld.Third Member was very much binding on the ld. Accountant Member. The ld. Accountant Member who is in minority was bound to follow the opinion of the ld. Third Member in its true letter and spirit. It was necessary for judicial propriety and discipline that the member who is in minority must accept as binding opinion of the ld. Third Member. The reliance is also placed on the decision of the Hon'ble Apex Court in Assistant Collector of Central Excise v. Dunlop India Ltd.(1985) 154 ITR 172 (SC), wherein it has been observed and held (page 180) :

"We desire to add and as was said in Cassell and Co. Ltd. v. Broome [1972] AC 1027 (HL), we hope it will never he necessary for us to say so again that " in the hierarchical system of courts " which exists in our country, " it is necessary for each lower tier ", including the High Court, " to accept loyally the decisions of the higher tiers ". " It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary ..... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted" (See observations of Lord Hailsham and Lord Diplock in Broome v. Cassell). The better wisdom of the court below must yield to the higher wisdom of the court above. That is the strength of the hierarchical judicial system……"

41. In this view of the matter, the questions framed by the ld. Accountant Member while giving effect to

the opinion of majority are outside the purview of section 255(4) of the Act and hence have no relevance.

42. Now we shall discuss the decisions relied upon by the ld. DR.

43. In Deepak Agro Foods (supra), it has been held

> "15. All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, nonest and void abinitio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties. (See: Kiran Singh & Ors. Vs. Chaman Paswan & Ors.1). However, exercise of jurisdiction in a wrongful manner cannot result in a nullity - it is an illegality. 1 AIR 1954 SC 340 capable of being cured in a duly constituted legal proceedings."

Whereas in the case before us, the ld. Third Member has passed the order after hearing the parties and after considering the material including the additional evidence filed by the assessee, which was also considered by the Members who originally heard the appeal, therefore, there is no irregularity in the order of the ld. Third Member and therefore, the decision

relied on by the ld. DR is distinguishable and not applicable to the facts of the present case.

44. In Baker Technical Services (P) Ltd.(supra), the Third Member had partly agreed with the Ld. Accountant Member and partly agreed with the ld.Judicial Member, therefore, he while observing that if the Division Bench finds it difficult to form the majority opinion as per the orders in this case, it is suggested that a reference may be made to the Hon'ble President of ITAT for making a further reference to a Member or Members for resolving a difference of opinion in accordance with law.

45. Whereas in the case before us, there is no such situation. The ld.Third Member while agreeing with the views of the ld. Judicial Member has passed the order in favour of the assessee, therefore, the majority of opinion has been arrived at and, therefore, the decision relied on by the ld. DR is distinguishable and not applicable to the facts of the present case.

46. In B.T.Patil & Sons Belgaum Construction (P.) Ltd.(supra), the questions for considerations before the Larger Bench were :

"(1) Whether on facts and circumstances of the case, the appellant assessee is entitled for claiming of deduction under the provisions of section 80-IA(4) in respect of the projects undertaken?

(2) Whether the Tribunal has to decide an issue on the basis of the law as it stands on the day of the passing of the order?"

On the question No.1 it has been held

"……. that the conditions set out in sub-section (4) clause(i) are not satisfied and, hence, the assessee cannot claim deduction under this section. The insertion and substitution of the Explanation is only to clarify that the deduction cannot be allowed in relation to a business in the nature of works contract under any circumstances. In other words, the view emerging from the careful circumspection of sub-section (4) has been endorsed by the Explanation and that too with retrospective effect from 1.4.2000 thereby covering both the years under consideration. We, therefore, answer question No.1 in negative by holding that the assessee is not entitled to deduction under the provisions of section 80-IA(4) in respect of the projects undertaken. (para 59)

On the question No.2, it has been held

"……that the Tribunal is not empowered but duty bound to apply such retrospective amendment made to the relevant section after allowing chance to the aggrieved party to address on such retrospective amendment concerning the dispute in question. We, therefore, answer this question in affirmative by holding that the Tribunal has to decide an issue on the basis of the law as it stands on the day of the passing of the order." (para 26)

47. Whereas in the case before us the issue is entirely different i.e. whether the order proposed by the ld. Accountant Member while giving effect to the opinion of the majority consequent to the opinion expressed by the ld. Third Member, can be said to be a

valid order. Therefore, the decision relied on by the ld. DR is of no help to the Revenue and hence not applicable.

48. In M/S. S.D. Fine Chemicals Pvt. Ltd. (supra), it has been held that if the Third Member of the Tribunal has not dealt with the case in full and proper manner and has disposed of the issue in cryptic manner, the matter has to be remitted back to the Third Member for a fresh opinion after hearing the parties.

49. Whereas in the case before us, the ld.Third Member has passed a detailed and reasoned order and it is not the case of the Revenue that the ld. Third Member has not dealt with the any of the issues or plea taken by the Revenue or the order passed by him is a cryptic order, therefore, the decision relied on by the ld. DR is distinguishable and not applicable to the facts of the present case.

50. In Abhay Kumar Shroff (supra) it has been held that if the additional evidence enables the Tribunal to pass order or for any other substantial cause it could require the parties to do so. There is no gain saying that while this power could be exercised by the Appellate Tribunal suo motu the jurisdiction vested in the Tribunal could be got invoked at the instance of one of the parties before it.

51. Whereas in the case before us the additional evidence, after providing opportunity, was considered by both the members who originally heard the appeal and the same was also considered by the ld. Third Member, therefore, the decision relied on by the ld. DR rather supports the assessee's case.

52. There is no quarrel with the principles enunciated in the aforesaid decision of the Tribunal in Khopade Kisanrao Manikrao (supra) inasmuch as in the case before us the additional evidence after providing opportunity was considered by the ld. Third Member, therefore, the decision relied on by the ld. DR rather supports the assessee's case.

53. In Shri Ramdas Motor Transport (supra) it has been held (page 4) :

> "4. Question No. 11.-Except raising bare ground in the I. T. C. that the Third Member has not answered the reference as contemplated under section 255(4) of the Act, no argument is advanced before us as to how the order of the Third Member is unsustainable in law. We have, however, perused the order passed by the Third Member. He was called upon to answer three questions on which there was a difference of opinion among the two Members. The Third Member in a well considered order, answered the reference by giving sound and valid reasons agreeing with the Accountant Member. Thus, the majority view was in favour of the assessee and a

> consolidated order was accordingly passed by the Tribunal in accordance with the provisions of section 255(4) of the Act. Therefore, we are not ready to accept the contention that the order of the Appellate Tribunal does not represent the majority view. There is absolutely no question of law involved in this point. We, therefore, decline to refer this question also."

54. Whereas in the case before us, the ld. Third Member in a well considered order, answered the reference by giving sound and valid reasons agreeing with the views of ld. Judicial Member, therefore, the decision relied upon by the ld. DR is distinguishable and not applicable to the facts of the present case.

55. For the reasons as discussed above we hold that on a difference of opinion among the two Members of the Tribunal, the ld.Third Member was called upon to answer two questions on which there was difference of opinion among the two members who framed the questions and the ld.Third Member in a well considered order, answered the reference by giving sound and valid reasons agreeing with the views of the ld. Judicial Member. Thus, the majority view was in favour of the assessee. We further hold that the proposed order dated 18.2.2010 of the ld. Accountant Member who is in the minority and had

become functus officio wherein he has expressed his inability to give effect to the opinion of the majority and proceeded to frame three new questions to be referred to the Hon'ble President, ITAT again for resolving the controversy cannot be said to be a valid or lawful order passed in accordance with the provisions of section 255(4) of the Act and, hence, the said order dated 18.2.2010 proposed by the ld. Accountant Member is not sustainable in law. Accordingly, we answer the question referred to us in negative i.e.in favour of the assessee.

56. At the time of hearing, with the consent of the parties and in the interests of justice, it has been decided by the Hon'ble President to finally dispose of the appeals on the basis of majority view. Therefore, based on the opinion of the majority, the ground wise decision of the appeals for the assessment years 2004-05 and 2005-06 is as under :

ORDER GIVING EFFECT

Assessment Year : 2004-05

57. Ground Nos.1 and 2 are against the confirmation of action of the AO in appointing Special Auditor u/s 142(2A) of the Act.

58. It has been decided by the members who originally heard the appeal against the assessee and in favour of the Revenue. The grounds taken by the assessee are, therefore, rejected.

59. Ground No.3 is against the sustenance of disallowance of Rs.2,76,885/- paid to Mr. Sudhanshu Purohit and treating the amount of Rs.1,17,627/- receivable as income from Mr. Sudhanshu Purohit.

60. It has been restored back by the members who originally heard the appeal to the file of the AO to examine the issue afresh. The ground taken by the assessee is, therefore, partly allowed for statistical purposes.

61. Ground No.4 is against the sustenance of addition of Rs.4,78,12,403/- received from Mr. Somendra Khosla.

62. As per majority view, the issue is decided in favour of the assessee and against the Revenue by deleting the same. The ground taken by the assessee is, therefore, allowed.

63. Ground Nos.5 to 8 are not pressed, hence, they are dismissed being not pressed.

64. Ground No.9 is against the sustenance of addition of the value of 150 Room nights vouchers Rs.21,00,000/- on adhoc basis or in alternative, as an additional ground for assessment year 2005-06, the same may be allowed in assessment year 2005-06 as loss/bad debts.

65. It has been restored back by the members who originally heard the appeal to the file of the AO to decide the same as per directions given by the Tribunal. The ground including the additional ground taken by the assessee are therefore, partly allowed for statistical purposes.

66. Ground No.10 is against the sustenance of disallowance of bad debts written off Rs.5,44,000/-.

67. The Members who originally heard the appeal confirmed the disallowance of Rs.4,45,000/- and deleted the balance amount of Rs.99,000/-. The ground taken by the assessee is, therefore, partly allowed.

68. Ground No.11 is against sustenance of addition of Rs.4,11,217/- u/s 68 of the Act.

69. It has been decided by the members who originally heard the appeal in favour of the assessee and against the Revenue by deleting the amount of Rs.4,11,271/-. The ground taken by the assessee is, therefore, allowed.

70. Ground Nos.12 and 13 are against the sustenance of disallowance of the expenses Rs.7,56,16,910/- and Rs.61,93,015/-.

71. As per majority view, the issue is decided in favour of the assessee and against the Revenue by deleting the same. The grounds taken by the assessee are, therefore, allowed.

Assessment year 2005-06.

72. Ground No.1 is against the sustenance of addition of Rs.1,02,91,176/- received from Shri Somendra Khosla.

73. As per majority view, the issue is decided in favour of the assessee and against the Revenue by deleting the same. The ground taken by the assessee is, therefore, allowed.

74. Ground No.2 is against the deletion of addition of Rs.10,42,027/- towards interest paid to Shri Somendra Khosla.

75. It has been decided by the members who originally heard the appeal in favour of the assessee and against the Revenue by deleting the same. The ground taken by the assessee is, therefore, allowed.

76. Ground No.3 is against the sustenance of disallowance of bad debts Rs.15,58,655/-.

77. It has been decided by the members who originally heard the appeal in favour of the assessee and against the Revenue by deleting the same. The ground taken by the assessee is, therefore, allowed.

78. Ground No.4 and 5 are against the sustenance of disallowance of expenses of Rs.7,95,73,902/- and Rs.37,03,683/-.

79. As per majority view, the issue is decided in favour of the assessee and against the Revenue. The ground taken by the assessee is, therefore, allowed.

80. In the light of discussions, besides answering the reference, the captioned appeals be treated as partly allowed in the manner indicated.

Order pronounced in the open Court on 30th Mar., 2012.

sd	sd	sd
(P.M.JAGTAP)	(G.E.VEERABHADRAPPA)	(D.K.AGARWAL)
Accountant Member	President	Judicial Member

Mumbai : 30th March, 2012.

SRL:

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A) concerned.
5. The DR/ITAT, Mumbai.
6. Guard File.

By Order

true copy

Assistant Registrar, ITAT, Mumbai.